

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG DIVISION, PRETORIA
MATTER HEARD VIRTUALLY

CASE NO: A196/2020

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED
18/3/2021	
DATE	SIGNATURE

In the matter between:

MOSES MAHLANGU

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

MALI J:

INTRODUCTION

- [1] The appellant was charged in Benoni Regional Court ("trial court") with two counts of murder committed on 19 November 2019. He was legally represented. On 26 June 2020 the appellant pleaded guilty to all charges

and the statement in terms of section 112 of the Criminal Procedure Act 51 of 1977 ("the act") was admitted accordingly.

- [2] The trial court imposed a sentence of life imprisonment in respect of count one which the court referred to as premeditated murder. The trial court referred to count two as ("*dolus eventualis*"). In respect of count two a sentence of imprisonment for a period of 15 years was imposed and a period of 10 years was ordered to run concurrently with the sentence of life imprisonment. The appeal concerns the sentence imposed on count one that of life imprisonment.

FACTS

- [3] Brief summary of facts is that on the day of committing the murders the appellant was with both deceased. The deceased persons were biological sisters and the deceased in count one was his girlfriend. A quarrel ensued between the appellant and deceased in count one. Ultimately he strangled and stabbed both deceased to death.

ISSUE

- [4] The issue as presented by the appellant's Counsel in the heads of arguments is as follows:
- 4.1 Whether the Regional Court found that the murder in count 1 was premeditated and therefore invoked sec 51(1) of the Criminal Law Amendment Act 105 of 1997;
- 4.2 Correctly imposed the minimum sentence of life imprisonment and not finding that it was disproportionate to the circumstances of the case and that there were no substantial and compelling circumstances.

LAW

- [5] In considering an appropriate sentence on appeal the court must exercise caution not to erode the discretionary powers of the trial court¹. It is trite that the power of an appeal court to interfere with sentence is limited.
- [6] Section 51 of the Minimum Sentencing Act (*"minimum sentences act"*) sets out minimum sentences applicable to certain offences. Section 51(1) provides:
- [7] *"Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life."*
- [8] Part I of Schedule 2 includes reference to murder. Section 51(2)(b) provides for minimum sentences for a range of offences referred to in Part III of Schedule 2. The minimum sentence for a conviction of murder under Part III of Schedule 2 varies from 20 years to imprisonment for life, depending on whether the convicted person has committed previous offences.
- [9] Section 51(2) further provides that "the maximum term of imprisonment that a *regional court* may impose in terms of [subsection 2] shall not exceed the minimum term of imprisonment that it must impose in terms of [subsection 2] by more than five years".
- [10] Flowing from the above; it is mandatory for the trial court to appraise the accused before pleading of the intended sentences to be imposed in the event the accused is found guilty. The warning takes into account that the accused is expected to address the court on whether there are substantial

¹ S v Pillay 1977 (4) SA 531 (A) at 535 E-F

and compelling circumstances which would make the court to deviate from the minimum sentences prescribed above.

AD SENTENCE

- [11] On behalf of the appellant the court is persuaded to accept that the charge sheet is defective in that, it does not contain reference to section 51(1) or 51 (2) of the Minimum Sentences. Another complaint about the charge sheet is that it does not contain the allegation that the state will rely on premeditated murder as contemplated in Part 1 of Schedule 2 of the minimum sentences act.
- [12] *The concept of a planned or premeditated murder is not statutorily defined. We were not referred to, and nor was I able to find, any authoritative pronouncement in our case law concerning this concept. By and large it would seem that the question of whether a murder was planned or premeditated has been dealt with by the court on a casuistic basis. The Concise Oxford English Dictionary 10 ed, revised, gives the meaning of premeditated as to "think out or plan beforehand" whilst "to plan" is given as meaning "to decide on, arrange in advance, make preparations for an anticipated event or time". Clearly the concept suggests a deliberate weighing-up of the proposed criminal conduct as opposed to the commission of the crime on the spur of the moment or in unexpected circumstances. There is, however, a broad continuum between the two poles of a murder committed in the heat of the moment and a murder which may have been conceived and planned over months or even years before its execution. In my view only an examination of all the circumstances surrounding any particular murder, including not least the accused's state of mind, will allow one to arrive at a conclusion as to whether a particular murder is "planned or premeditated". In such an evaluation the period of time between the accused forming the intent to commit the murder and carrying out this intention is obviously of cardinal importance but, equally, does not at some arbitrary point, provide a ready-made answer to the question of whether the murder was "planned or premeditated".²*

² S v Pillay CCD 48/17 KZN

[13] On behalf of the respondent it was conceded that the charge sheet does not refer to the above sections. *"I am of the view that the pronouncement of the act had to be mentioned in the charge sheet or at the outset of the trial would be elevating form over substanceand it is only after a diligent examination of the facts that it can be decided whether an accused had a fair trial or not."*³

[14] From the above the appeal court is enjoined to look at the circumstances and the facts of the case and examine those accordingly. We now turn to examine the circumstances of the charge in the present case.

[15] At Annexure E of the charge sheet the following bears:

"Court Explains:

(1). Legal Aid/Legal Representation

.....

(2). Bail Right:- Schedule 6 Onus

(3). Part I and II OF Act 105 of 1997- Prescribed Sentences: -

3.1 years (1st Offender); 20 years (2nd Offender); 25 years (3rd Offender)

3.2 Imprisonment for Life

[16] Secondly Mr Mangena who appeared on behalf of the appellant in the trial court is recorded at page 1 of the charge sheet as follows:

³ Sv Tshoga 2016 ZSCA 205 para 22

"I did apprise the accused person of Part 1 and Part 2 of Act 105 of 1997 on 9 January 2020"

[17] We are also persuaded to follow the Constitutional Court ("the CC") decision in *Ndlovu v S* below. *"It is trite that Magistrates' Courts are creatures of statute and have no jurisdiction beyond that granted by the Magistrates' Courts Act and other relevant statutes."*⁴

[18] The CC held that the Magistrate was aware that the charge was "rape read with the provisions of [s]ection 51(2)" and specifically found Mr Ndlovu "guilty as charged". This wording simply does not permit an interpretation that the Magistrate in fact convicted Mr Ndlovu of rape contemplated in section 51(1).

[19] We cannot accept the appellant's contention because the misdirection by the trial court in *Ndlovu* is patently dealt with by the CC. The issue raised is that Mr Ndlovu was never charged with 51(1) he was charged with 51(2), therefore it was not open to the trial court to impose a life sentence envisaged in 51 (1).

[20] In the present case, despite the lack of reference to 51 (1) in the charge sheet, the imperative is that the appellant was warned accordingly. The trial court pronounced itself clearly as to why the appellant was found guilty of same. There is nothing more required from the trial court.

[21] The further complaint is the disproportionality of sentence because the trial court did not consider the substantial and compelling circumstances. It is on record that the trial court took into consideration everything.⁵

⁴ *Ndlovu v S* (CCT174/16) [2017] ZACC 19; 2017 (10) BCLR 1286 (CC); 2017 (2) SACR 305 (CC) (15 June 2017)

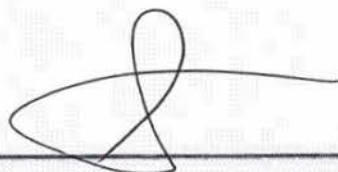
⁵ - para 41

⁶ Page 23 line 20-24 and page 24 line 1-9.

- [22] The only problem with the trial court's pronouncement on sentence in count two is what I call mathematics ("maths"). There is no legal basis for the trial court's maths that a period of 5 years should be served separately from life sentence. In simple terms it is not conceivable to separate 5 years of life from one's life. The maths is a misdirection. Furthermore, the law is trite that any sentence imposed with life sentence should run concurrently.
- [23] In conclusion we are satisfied that the magistrate did not misdirect himself in imposing life sentence in respect of count one.
- [24] In the circumstance the following order shall ensue;

ORDER

1. The appeal is dismissed.
2. The sentence imposed in count 2 is to run concurrently with the sentence imposed in count 1.



N. P. MALI

JUDGE OF THE HIGH COURT

I agree


D. RICK

ACTING JUDGE OF THE HIGH COURT

IT IS SO ORDERED.

APPEARANCES

FOR THE APPELANT :

Adv Masete (Ms)

For THE RESPONDENT :

Adv Krause (Mr).